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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 185

C. C. THOMAS, Petitioner,

v.

YOUNGSTOWN SHEET AND TUBE COMPANY; WEBB & KNAPP, INC.; MURPH'S EXPRESS; a partnership; E. T. CRESSMAN; PETER B. TAYLOR; RICE'S FOOD STORE; and DAWSON, NAGEL, SHERMAN & HOWARD, Respondents.

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION BRIEF

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BRIEF IN REPLY TO RESPONDENT'S OPPOSITION BRIEF

I. INTRODUCTION

This brief is submitted by the Petitioner, C. C. Thomas, herein in response to the Opposition Brief to the Petition for Writ of Certiorari filed herein on behalf of Webb & Knapp, Inc., pursuant to Supreme Court Rule 24, paragraph 4.

II. QUESTIONS PRESENTED

The question presented is as set forth in the Petition for Writ of Certiorari by Thomas. That question is whether Thomas was deprived of due process of law under the circumstances where the Referee in Bankruptcy ordered him to proceed to trial of the issue of the commission of an act of bankruptcy without a trial by jury, when Thomas had demanded a jury trial in writing in his original Answer and at the instant in time of being so ordered to proceed to trial tendered to and filed with the Referee a further demand in writing for a trial by jury on the question of the commission of the act of bankruptcy; and finally after verbal objections to the procedure, obeyed the Referee's order and participated in the hearing before the Referee.

III. REFERENCE TO OPINIONS BELOW

The opinion of the Chief Referee in Bankruptcy, United States District Court for the District of Colorado, entered June 19, 1962 (R. 25-29), is not officially reported. The opinion of the United States District Court for the District of Colorado which was entered November 30, 1962 (R. 35-48) is reported at 211 F. Supp. 187. The opinion of the United States Court of Appeals, filed February 17, 1964 (Appendix A, Petition for Writ of Certiorari, pp. 9-10), is not officially reported.

IV. STATUTES INVOLVED

A. Section 19 of the Bankruptcy Act, Title 11 U. S. Code 42 reads as follows: (a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his in-

solvency, except as herein otherwise provided, and of any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefore at or before the time within which an answer may be filed. If such application is not filed within such time, the trial by jury shall be deemed to have been waived.

B. General Order 12 (1), Title 11 U. S. Code, Following Section 53 reads as follows: After a general reference, all proceedings, except such as are required by the Act or the General Orders to be before the Judge, shall be had before the Referee.

V. ARGUMENT

Throughout the proceedings before the District Court on review and before the Circuit Court of Appeals, Webb & Knapp has distorted the question which Thomas is attempting to raise. In each brief Webb & Knapp simply reiterate the words of the District Judge, in his opinion below (Consolidated Record p. 47 at R. 190) wherein the Judge introduced the question of waiver of jury trial in order to sanction what had been done by the Referee in his Court. The District Judge, in spite of the Court Record before him, refused to acknowledge the presence of Thomas's Amended Answer demanding a trial by jury in writing on the question of the commission of an act of bankruptcy which was tendered to and filed with the Referee on the 5th day of April, 1962 at the precise instant that the Referee ordered him to trial before the Referee without a jury. (Pages 20-22 of the Consolidated Record and Appendix A to this Brief). The District Judge contends: "Attorneys for Thomas made no objection what-

soever to proceeding to hearing on April 6, 1962; furthermore, they filed a brief with the referee, which brief dealt entirely with the question of the act of bankruptcy which brief was filed on May 17, 1962." (Page 47 of the Consolidated Record and Appendix B of this Brief). The preceding statement of the District Judge is incorrect. Attorneys for Thomas did make objection to proceeding to hearing. (Page 111 of the Consolidated Record). A demand in writing for a trial by jury on the question of the commission of the act of bankruptcy was tendered to and filed with the Referee at the instant of the Referee's Order to proceed. (See Page 111 of the Consolidated Record at R-140). The District Judge refers to a brief filed on May 17, 1962, and fails to recognize that the brief he refers to is one ordered by the Referee of the parties after the hearings of April 5 and 6, 1962, and in doing so the Referee ordered that the briefs be limited to the Act of Bankruptcy. The District Judge is in error by not recognizing the written demand of Thomas for a trial by jury on the question of the act of bankruptcy in his Amended Answer tendered to and filed with the Referee at the precise instant in time that the Referee ordered the hearing to proceed on the question of the act of bankruptcy on April 5, 1962, and denying Thomas the right he had twice demanded in writing, the right of a trial by jury. Even in spite of this erroneous ruling of the District Judge, Webb & Knapp distort the issue further by attempting to apply this ruling to facts other than those on which the Judge based his decision.

The fact is that the Referee tried an issue, that of the commission of the act of bankruptcy without a jury, in spite of a written demand, when that issue is by all law, both case and statute, as well as tradition, reserved

to the District Judge. In Webb & Knapp's Opposition Brief the whole argument is that Counsel for Thomas were either dishonest or incapable, because Webb & Knapp charges, it was the Counsel for Thomas who waived the jury trial, and now refuse to admit it. (See Page 2 of the Opposition Brief). That argument is not only a distortion of the record, it is also an attempt to divert attention from the central issue.

The attorney for Webb & Knapp while before the Circuit Court of Appeals stated in his brief that Counsel for Thomas waived the jury trial at an unidentified meeting in the Referee's chambers. In the Opposition Brief before this Court (On page 2) the statement is that the waiver occurred: "At a conference prior to a hearing in the Referee's Office." On the date of this Reply Brief this meeting remains unidentified.

The Opposition Brief raises questions that have nothing to do with the Thomas Petition for Writ of Certiorari. Let this Court consider the issues raised by Thomas when he came to this Court for redress. That question is whether the District Judge erred in holding that Thomas waived his jury trial by participating in hearings before the Referee, without a jury, on April 6, 1962. It has nothing whatever to do with alleged meetings in Referee's chambers or alleged unrecorded concessions by attorneys for Thomas.

The law pertaining to the concept of waiver of trial by jury is thoroughly discussed in the Petition for Writ of Certiorari. This Reply Brief seeks only to supplement and clarify the facts which pertain to the central issue of

what happened in 1962 regarding the Thomas loss of trial by jury.

The loss of the jury trial began with a Notice sent by the Referee to all parties on January 18, 1962, wherein it was stated that a hearing was to be held by the Referee on January 29, 1962, and that the issue was to be: "To set for hearing the issues determinable by the Referee." (Page 16 of the Consolidated Record and Appendix C to this Brief). No mention was made of consideration of matters reserved to the judge, which matters include a jury trial. Therefore there could be no waiver at that point.

Pursuant to that notice a hearing was had and an order was entered setting: "Issues triable by the Referee," for hearing on March 7 and 8, 1962. (See Appendix D to this Brief).

The attorney for Webb & Knapp requested agreement from Counsel for Thomas to a change of time for the hearing to a later date as the dates of March 7 and 8 conflicted with a trip he had planned in the Carribean area, and on February 23, 1962, the Referee sent a letter to interested parties notifying them that the dates of the hearing had been changed to April 5 and 6, 1962. The Referee added these words to his letter: "If it shall appear there are sufficient creditors or intervening creditors the hearing will then proceed on the merits with respect to the commission of the act of bankruptcy alleged in paragraph 7 of the original petition herein." This letter was not, under the Bankruptcy Act, either reviewable or appealable. Thomas was helpless to do anything at this point. (See Appendix E of this Brief for Referee's letter).

On April 5, 1962, all interested parties attended the hearing, including Thomas, who had no alternative because the qualification of creditors is a proper matter for the Referee to consider. Evidence was put on regarding the qualifications of certain petitioning creditors and after the noon recess the Referee entered his order that there were a sufficient number thereof.

It is what happened at this point that the District Judge failed to consider when he introduced the idea of a waiver of a trial by jury. (See Appendix B of this Brief for the Judge's opinion on this subject). The Referee, after ruling that there were enough creditors qualified, ordered: "That we proceed at this time with the testimony on the act of bankruptcy tendered by the amendment which was filed." Precisely at that point in time, within seconds of the utterances of the Referee, Thomas tendered to and filed with the Referee his Amended Answer to the Amended Petition which again demanded in writing a trial by jury on the question of the commission of the act of bankruptcy, which is an absolute right when demanded in writing, according to Section 19 of the Bankruptcy Act.

Your Appellant cannot believe that filing a written demand for a jury trial amounts to a waiver of jury trial. The weakness of that argument is tacitly admitted by the Counsel for Webb & Knapp when they continue to try to find other basis on which to rely regarding waiver.

VI. CONCLUSIONS

Thomas's Petition for Writ of Certiorari must stand or fall on the question of whether a man can waive a jury trial by making a demand in writing therefore and then obeying thereafter an Order of the Referee to go to trial without the jury. It is of utmost importance in the preservation of justice that this Court undertake a detailed review of this case as to the points raised by the Petition for the Writ of Certiorari. Thomas is entitled to a trial by jury and this Court should so order.

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Attorneys for Petitioner.

APPENDIX A

(Page 22 of the Consolidated Record)

AMENDED ANSWER TO INVOLUNTARY BANKRUPTCY PETITION

Sixth Defense

1. Respondent alleges that he was not insolvent at the time of filing of the petition or at the time any of the liens were so obtained.

Wherefore, your respondent prays that a hearing may be had on said petition and this answer, for costs made and expended, and the issues presented thereby may be determined by a jury.

C. C. Thomas
Respondent — Alleged Bankrupt

Allen A. Thoreen
Attorney for Respondent.

Clayton H. Morrison
Attorney for Respondent

(Verified)

Filed April 5, 1962.

APPENDIX B

(Page 47 Consolidated Record)

EXCERPT FROM DISTRICT JUDGE DOYLE'S OPINION

Thomas demanded a jury trial on all issues presented in his answer, but from a study of the record he did not pursue the matter. He made no objection to having the Referee hear the question of the act of bankruptcy. The intention of the Referee to try this issue was set forth in a letter dated February 25, 1962. The Referee did not call counsel's attention to the fact that Thomas had a right to a jury trial on this issue. Attorneys for Thomas made no objection whatsoever to proceedings to hearing on April 6, 1962; furthermore, they filed a brief with the referee, which brief dealt entirely with the question of the act of bankruptcy which brief was filed on May 17, 1962.

* * * *

* * * The bankruptcy proceedings is statutory in character and thus the right arises from the Act itself. See Section 19 of the Bankruptcy Act, Title 11 U. S. C., 42. It is, nevertheless, an absolute right, once a written application for it has been submitted. See Elliott v. Toeppner, 187 U. S. 327 (1902), 23 S. Ct. 133; Burns Bros. et al v. Cook Coal Co., 42 F. 2d 109 (3 Cir., 1930).

* * * *

By the Court:

William E. Doyle, Judge,
United States District Court

Entered November 30, 1962

APPENDIX C

(Page 16 Consolidated Record)

Minutes — January 18, 1962

The Chief Referee, having had under advisement the issues raised by the fourth defense of the alleged bankrupt, set up in paragraph 5 of his answer (filed January 24, 1961) to the original petition for involuntary adjudication, and having considered the record and the briefs submitted October 12 and November 22, 1961, by the alleged bankrupt; October 30, 1961, by Webb & Knapp, Inc., intervenor; November 1, 1961, by The Youngstown Sheet and Tube Co., original petitioner; and being fully advised in the premises, does Order, (1) that said fourth defense, so far as it is directed to paragraph 6 of said original petition, be and it is sustained; (2) that said original petition, so far as it is based or dependent upon said paragraph 6 be and it is dismissed but not otherwise; (3) that the intervening petitions of Webb & Knapp, Inc., Peter B. Taylor, Murph's Express, Rice's Food Store and E. T. Crossman shall be considered as asserting only and are limited to the act of bankruptcy alleged in paragraph 7 of said original petition to have been committed; and (4) that the issues determinable by the Referee and raised by said original petition (excluding said paragraph 6), shall be set for hearing on and heard by the Referee on due notice to the alleged bankrupt, The Youngstown Sheet and Tube Co., Webb & Knapp, Inc., Peter B. Taylor, Murph's Express, Rice's Food Store and E. T. Crossman.

And it is further Ordered, that the time within which a petition to review the foregoing orders, or any of them

may be filed be and it is enlarged to the tenth day following the determination by the Referee of the matters mentioned in paragraph (4) of said orders.

B. C. Hilliard, Jr.

Chief Referee in Bankruptcy.

APPENDIX D

(Page 17 Consolidated Record)

Minutes — January 29, 1962.

Pursuant to notice of January 18, 1962, the alleged bankrupt appeared this day by Clayton H. Morrison, his attorney, and Webb & Knapp, Inc., by Gerald M. Quiat, it's attorney, and the others to whom said notice went did not appear. Ordered, that the issues triable by the Referee, including any necessary determinations as to whether any intervener is in fact a qualified creditor, be and they are set for hearing in the Bankruptcy Court Room, Post Office Bldg., Denver, Colorado, on March 7 and 8, 1962, to commence each day at 9:30 A.M.

APPENDIX E

(A letter by the Chief Referee in Bankruptcy)
(Pages 17 and 18 Consolidated Record)

February 23, 1962

C. C. Thomas
No. 26617

Richard H. Shaw, Esq., Denver U. S. National Center, Denver 2, Colorado.

Clayton H. Morrison, Esq., 1544 Elmira Street, Aurora 8, Colorado.

Allen A. Thoreen, Esq., Majestic Bldg., Denver 2, Colorado.

Gerald M. Quiat, Esq., First National Bank Bldg., Denver 2, Colorado.

Mr. Peter B. Taylor, Meadow Brook Drive, Boulder, Colo.

Mr. E. T. Cressman, 2244 South Madison St., Denver 10, Colorado.

William P. Horan, Esq., Majestic Bldg., Denver 2, Colo.

Murph's Express, 1401 Zuni Street, Denver 4, Colorado.

Rice's Food Store, 2202 Kearney Street, Denver 7, Colo.

Gentlemen:

Please be advised that the order setting phases of this matter for hearing on March 7 and 8, 1962 have been vacated.

(Page 2 of the letter repeats the names of the addresses and continues)

In lieu of said settings, please take notice and you are hereby notified, that at 9:30 A.M., April 5, 1962, in the Bankruptcy Court Room, Post Office Bldg., Denver, Colorado, and, if necessary, also at 9:30 A.M., April 6, 1962, in the same place, the Referee will hear all issues in this matter triable by the Referee, including determination preliminarily of the right of any party to proceed as a creditor or intervening creditor. If it shall appear there are sufficient creditors or intervening creditors the hearing will then proceed on the merits with respect to the commission of the act of bankruptcy alleged in paragraph 7 of the original petition herein.

Yours very truly,

Benjamin C. Hilliard, Jr.

Chief Referee in Bankruptcy

jf